Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

SECOND REPORT AND ORDER

Adopted: May 31, 1996 **Released: June 3, 1996**

By the Commission: Chairman Hundt, Commissioners Quello, Ness, and Chong issuing separate statements.

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I. INTRODUCTION

1. The Telecommunications Act of 1996 (the "1996 Act")[1] added Section 653 to the Communications Act. Section 653 of the Communications Act establishes a new framework for entry into the video programming delivery marketplace -- the "open video system."[2] As designed by Congress, the open video framework provides an option, particularly to a local exchange carrier, for the distribution of video programming other than as a "cable system" governed by all

[1]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, approved February 8, 1996 (the "1996 Act").

[2]*See* Sections 651 and 653 of the Communications Act. Communications Act of 1934, 47 U.S.C. § 151 *et seq.* ("Communications Act").

of the provisions of Title VI.[3] If a telephone company agrees to permit carriage of unaffiliated video programming providers on just, reasonable and non-discriminatory rates and terms, it can be certified as an operator of an "open video system" and subjected to streamlined regulation under Title VI. [4]

2. In establishing this structure, we believe that Congress intended to advance competition in two areas of the video market. First, Congress sought to encourage telephone companies to enter the video programming distribution market and to deploy open video systems in order to "introduce vigorous competition in entertainment and information markets" by providing a competitive alternative to the incumbent cable operator.[5] Congress' incentive for such entry was not only exemption from particular requirements of Title VI, but that streamlined Title VI obligations apply in lieu of, and not in addition to, any requirements under Title II.[6] Second, by requiring open video system operators to provide carriage opportunities for video programming providers on terms that are just and reasonable, and not unjustly or unreasonably discriminatory, Congress sought to foster competition by encouraging multiple programming sources on open video systems.[7]

3. The open video system model can provide the competitive benefits that Congress sought to achieve: market entry by new service providers, enhanced competition, streamlined regulation, investment in infrastructure and technology, diversity of programming choices and increased consumer choice.[8] We believe that the best way to achieve Congress' goals is to give open video system operators the flexibility to enter and compete based on the demands of the marketplace. Our approach reflects the reduced regulatory burdens envisioned by Congress for open video systems.[9] Specifically, the open video system operator, by not being subject to traditional Title II regulation, as well as particular provisions of Title VI, is afforded substantial discretion in administering the open video system, subject to particular parameters of the law. A general level of guidance, however, is required to ensure compliance with Congress' particular directives under Section 653 and to give certainty to the participants. As described below, we have implemented Section 653 with the clear recognition that the open video system operator is a new entrant in the video marketplace with particular statutory obligations that can be

[3]Communications Act § 653(a)(3), 47 U.S.C. § 573(a)(3).

[4]Communications Act § 653(a)(1), 47 U.S.C. § 573(a)(1).

[5]Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 178 (February 1, 1996) ("Conference Report").

[6]Communications Act § 653(c)(3), 47 U.S.C. § 573(c)(3).

[7]Communications Act § 653(b)(1)(A)-(B), 47 U.S.C. § 573(b)(1)(A)-(B).

[8]Conference Report at 172, 177-78.

[9]*Id.* at 177-78.

implemented through streamlined regulation.

II. BACKGROUND

4. On February 8, 1996, the 1996 Act was signed into law. Among other things, the 1996 Act repeals the telephone-cable cross-ownership restriction imposed by the Cable Communications Policy Act of 1984 (the "1984 Cable Act"),[10] which prohibited telephone companies from providing video programming directly to subscribers in their telephone service areas. In addition, the 1996 Act repealed the Commission's "video dialtone" rules and policies,[11] which were established to permit telephone companies to participate in the video marketplace in a manner consistent with the statutory telephone-cable cross-ownership ban.[12] Under the video dialtone rules and policies, telephone companies could provide a common carrier video transmission service for programming provided by others, but, consistent with the statutory ban, were generally prohibited from providing any programming themselves in their telephone service areas.[13] The United States Courts of Appeal for the Fourth and Ninth Circuits, however, found the cross-ownership ban violated the First Amendment and the Commission was enjoined from

[10]Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613(b) (codified at 47 U.S.C. § 533(b)) ("the "1984 Cable Act").

[11]*See* 1996 Act § 302(b)(3); *Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry in CC Docket No. 87-266*, 7 FCC Rcd 300 (1991); *Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd 5069, *aff'd, National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994); *Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781 (1992), *aff'd, Memorandum Opinion and Order on Reconsideration and Third Notice of Proposed Rulemaking*, 10 FCC Rcd 244 (1994), *appeal pending sub nom., Mankato Citizens Tel. Co. v. FCC*, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992); *Third Report and Order*, CC Docket No. 87-266, 60 FR 31924 (June 19, 1995); *Fourth Report and Order*, CC Docket No. 87-266, FCC 95-357 (released August 14, 1995).

[12]The 1996 Act, however, also states that its repeal of the video dialtone rules and regulations does not require the termination of any video dialtone system that the Commission has approved prior to the enactment of the 1996 Act. 1996 Act § 302(b)(3). Consistent with Section 302(b)(3), in repealing its video dialtone rules and policies, the Commission did not require currently approved video dialtone systems to cease operations. *See Report and Order and Notice of Proposed Rulemaking* in CS Docket No. 96-46 and CC Docket No. 87-266 (terminated), released March 11, 1996 at para. 75.

NCTA filed a Petition for Reconsideration of the Commission's video dialtone ruling, asking (1) that outstanding video dialtone trials terminate in accordance with previously set deadlines, and (2) that companies holding outstanding commercial authorizations choose between open video service and franchised cable service. *See* Petition for Reconsideration, CC Docket No. 87-266 (Terminated), dated April 10, 1996. The Commission will address NCTA's Petition expeditiously in a separate Order, including the treatment of currently approved video dialtone systems now that open video system rules are in place.

[13]*See Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, 5820 (1992).

enforcing it against virtually all local exchange carriers.[14]

5. Contrary to the limited options available to local exchange carriers ("LECs") under the previous law for providing video programming, the 1996 Act offers telephone companies several options for entering and competing in the video marketplace. This is in keeping with the 1996 Act's general goal of "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[15] As the Conference Report for the 1996 Act (the "Conference Report") states:

> Recognizing that there can be different strategies, services and technologies for entering video markets, the conferees agree to multiple entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice of services that best meet their information and entertainment needs.[16]

Later, the Conference Report reiterates "the conferees recognize that telephone companies need to be able to choose from among multiple video entry options to encourage entry," and systems should be "allowed to tailor services to meet the unique competitive and consumer needs of individual markets."[17] In giving telephone companies broad flexibility to enter the video marketplace, the 1996 Act encourages competition and new investment.

6. The alternatives for the delivery of video programming services by telephone companies are set forth in Section 302 of the 1996 Act, which establishes a new Part V (Sections 651 through 653) of Title VI of the Communications Act. The specific entry options for telephone companies entering the video programming marketplace are set forth in Section 651, which provides that common carriers may: (1) provide video programming to subscribers through radio communication under Title III of the Communications Act;[18] (2) provide transmission of video programming on a common carrier basis under Title II of the Communications Act;[19] (3) provide video programming as a cable system under Title VI of the

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[14] *See Chesapeake & Potomac Tel. Co. of Virginia v. United States*, 42 F.3d 181 (4th Cir. 1994), *rehearing denied* (January 18, 1995), *cert. granted*, 115 S.Ct. 2608 (June 26, 1995), *remanded* (February 27, 1996); *U S West, Inc. United States*, 48 F.3d 1092 (9th Cir. 1995); *see also United States Tel. Ass'n v. United States*, No. 1:94CV01961 (D. D.C. Feb. 14, 1995).

[15] Conference Report at 113.

[16] *Id.* at 172.

[17] *Id.* at 177.

[18] Communications Act § 651(a)(1), 47 U.S.C. § 571(a)(1).

[19] Communications Act § 651(a)(2), 47 U.S.C. § 571(a)(2).

Communications Act;[20] or (4) provide video programming by means of an "open video system" under new Section 653 of the Communications Act.[21] The 1996 Act also provides that, to the extent permitted by Commission regulation, "an operator of a cable system or any other person may provide video programming through an open video system."[22]

7. Generally, Section 653 provides that if an entity certifies that it complies with certain non-discrimination and other requirements established by the Commission, its open video system will not be subject to regulation under Title II and will be entitled to reduced regulation under Title VI.[23] The Commission must approve or disapprove any open video system certification request within ten days of receipt.[24] An open video system operator's certification request must certify that it complies with the Commission's regulations implementing the requirements in Section 653(b), which: (1) prohibit the operator from discriminating among video programmers regarding carriage on its system; (2) require the operator to establish rates, terms and conditions of carriage that are just, reasonable and not unjustly or unreasonably discriminatory; (3) prohibit the operator or its affiliate, if carriage demand exceeds capacity, from selecting the video programming on more than one-third of its activated channels; (4) permit the operator to use channel sharing arrangements that provide subscribers with ready and immediate access to programming; (5) extend the Commission's sports exclusivity, network non-duplication and syndicated exclusivity regulations to open video systems; and (6) prohibit the operator from unreasonably discriminating in favor of its affiliates with regard to information provided to subscribers for the purpose of selecting programming. The legislative history indicates that the Commission is not to impose "Title II-like regulation" under the authority of Section 653.[25] Section 653(b)(1) directs the Commission to take all actions necessary (including any reconsideration) to prescribe regulations implementing these requirements within six months of the 1996 Act's enactment. Similarly, subsection 653(c)(2)(A) directs the Commission to take all actions necessary (including any reconsideration) to prescribe regulations applying, to the extent possible, Title VI "must-carry" and public, educational and governmental ("PEG") access obligations, and Title III retransmission consent obligations, to open video systems operators.

8. If the Commission approves an open video system operator's certification, the operator will qualify for the streamlined regulation of Section 653(c). Title VI provisions that do not apply to open video systems under Section 653(c) include: (1) Section 612 -- "leased

[20]Communications Act § 651(a)(3), 47 U.S.C. § 571(a)(3).

[21]Communications Act § 651(a)(3)-(4), 47 U.S.C. § 571(a)(3)-(4).

[22]Communications Act § 653(a)(1), 47 U.S.C. § 573(a)(1).

[23]Communications Act § 653(a)(1), (c), 47 U.S.C. § 573(a)(1), (c).

[24]Communications Act § 653(a)(1), 47 U.S.C. § 573(a)(1).

[25]Conference Report at 178.

access" obligations; (2) Sections 621 and 622 -- franchise requirements and fees (although an open video system operator will be subject to a gross revenue fee at a rate not to exceed the franchise fee paid by the local cable operator);[26] (3) Section 623 -- rate regulation; and (4) Section 632 -- consumer protection and customer service. In providing for such streamlined regulation, Congress again stressed its goals of flexible market entry, encouraging competition and investment, and reliance on market forces:

> There are several reasons for streamlining the regulatory obligations of such systems. First, the conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carriers that deploy open systems will be 'new' entrants in established video programming markets and deserve lighter regulatory burdens to level the playing field. Third, the development of competition and the operation of market forces mean that government oversight and regulation can and should be reduced.[27]

9. Section 653 establishes a process for the resolution of any disputes that may arise.[28] Generally, Section 653 provides that the Commission has the authority to resolve disputes regarding open video systems, and that it must do so within 180 days of submission.[29] Where the Commission's rules have been violated, the Commission may require carriage, award damages to a person improperly denied carriage, or both.[30] Aggrieved parties may also seek any other remedy available under the Communications Act.[31]

10. On March 11, 1996, the Commission released a Report and Order and Notice of Proposed Rulemaking (the "*Notice*"), seeking comment on how to implement the above requirements.[32] We received 61 comments and 79 replies in response to the *Notice*.[33] After consideration of the comments and reply comments, we hereby adopt the Second Report and

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[26]Communications Act § 653(c)(2)(B), 47 U.S.C. § 573(c)(2)(B).

[27]Conference Report at 178.

[28]Communications Act § 653(a)(2), 47 U.S.C. § 573(a)(2).

[29]*Id.*

[30]*Id.*

[31]*Id.*

[32]*See Report and Order and Notice of Proposed Rulemaking* in CS Docket No. 96-46 and CC Docket No. 87-266 (terminated), released March 11, 1996 (the "*Notice*").

[33]A list of parties that filed comments and reply comments in this proceeding, and the abbreviations used herein to refer to such parties, is attached as Appendix A.

Order herein.

III. OPEN VIDEO SYSTEMS

A. Qualifications to be an Open Video System Operator

1. Notice

11. New Section 653(a)(1) of the Communications Act provides:

> A local exchange carrier may provide cable service to its cable service subscribers in its telephone service area through an open video system that complies with this section. To the extent permitted by such regulations as the Commission may prescribe consistent with the public interest, convenience, and necessity, an operator of a cable system or any other person may provide video programming through an open video system that complies with this section.[34]

Pursuant to this section, a LEC, as defined in Section 3(26),[35] is qualified to be an open video system operator in its telephone service area. The *Notice* asked whether the second sentence of Section 653(a)(1) permits the Commission to allow cable operators and others, including LECs outside their telephone service areas, to become open video system operators, or whether it merely authorizes the Commission to allow them to provide video programming on the open video system operated by a LEC.[36] Specifically, given that the first sentence of Section 653(a)(1) allows LECs to provide "cable service," we sought comment on whether use of the term "video programming" in the second sentence was intended to restrict cable operators and others to the role of programming providers on an open video system and thus precludes them from also becoming open video system operators.[37] We also requested comment on what factors should govern the Commission's public interest determination under this section.[38]

2. Discussion

12. We conclude that the second sentence of Section 653(a)(1) authorizes the Commission to allow non-LECs to operate open video systems and to allow LECs to operate open video systems outside of their telephone service areas when the public interest, convenience,

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[34]Communications Act § 653(a)(1), 47 U.S.C. § 573(a)(1).

[35]Communications Act § 3(26), 47 U.S.C. § 153(26).

[36]*Notice* at para. 64.

[37]*Id.*

[38]*Id.* at para. 65.

and necessity are served. We find that it would serve the public interest, convenience and necessity to permit other entities, besides LECs, to become open video system operators. With respect to cable operators within their cable franchise areas, we conclude that it would serve the public interest, convenience, and necessity to allow a cable operator to operate an open video system in its cable franchise area if it is subject to "effective competition" under Section 623(l)(1) in its cable franchise area. This condition shall apply even if a cable operator also provides local exchange services within its cable franchise area. Our decision to allow cable operators to become open video system operators under these circumstances shall not be construed to affect the terms of any existing franchising agreements or other contractual agreements.

a. Statutory Construction

13. The starting point for our analysis is the statute. Where Congress "has directly spoken to the precise question at issue . . . that is the end of the matter," and the Commission must give effect to Congress' expressed intent.[39] If, however, the statute is silent or ambiguous with respect to a specific issue, the Commission's interpretation will be upheld so long as it is a "permissible" construction of the statute.[40]

14. We do not believe that Congress has addressed the issue of whether non-LECs may operate open video systems in a clear and unambiguous manner. In light of various factors discussed below, we interpret the statute as allowing non-LECs to operate open video systems to the extent permitted by Commission regulations. As a preliminary matter, we note that neither the statute nor the legislative history states that non-LECs are prohibited from operating open video systems. Second, we agree with several commenters that Congress has used the phrases "provide cable service" and "provide video programming" to refer to the same activity.[41] For instance, Section 651(a)(3) states that to the extent a common carrier is "providing video programming" to its subscribers in any manner other than a wireless operator or common carrier, it will be subject to the full requirements of Title VI unless "such programming is provided by means of an open video system" for which the Commission has approved a certification under Section 653.[42] Furthermore, as TCI argued:

> in the now-repealed cable-telephone company cross-ownership provision, former Section 613(b)(1), 47 U.S.C. § 533(b)(1), repealed by the 1996 Act, § 302(b), Congress made it unlawful for any local exchange carrier to "provide video programming" directly to subscribers. Interpreting the term "provide video

[39] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

[40] *Id.* at 843.

[41] *See, e.g.*, American Cable, et al. Comments at 23-24; Cablevision Systems/CCTA Comments at 34; TCI Comments at 23-24; Comcast, et al. Comments at 4; Cox Comments at 3-4.

[42] *See* American Cable, et al. Comments at 24.

> programming," the Fourth Circuit determined that Section 613(b)(1) "essentially prohibits local telephone companies from offering, with editorial control, cable television services to their common carrier subscribers."[43]

Similarly, the Commission found that Section 613(b)(1) was intended to ensure that common carriers did not provide video programming to subscribers "in the same manner as traditional cable operators;"[44] thus, the Commission found that an entity has to obtain a cable franchise (and thus is providing "cable service") only when the entity "selects or provides the video programming to be offered."[45] This interpretation was upheld by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").[46] We can assume that Congress meant to adopt our interpretation, as affirmed by the courts, when it passed the 1996 Act because Congress is presumed to intend the meaning of terms and phrases as they have been interpreted by agencies or courts.[47]

15. We disagree with the argument posed by the National League of Cities, et al. that it would not have been necessary for Congress to construct two separate sentences in Section 653(a)(1) if it had intended "cable service" and "video programming" to have the same meaning.[48] This argument does not take into account that Congress permitted non-LECs to operate open video systems subject to the Commission's findings regarding the public interest, convenience, and necessity. We believe the two sentences were used not to distinguish which entities may

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[43]TCI Comments at 23 (citing *Chesapeake & Potomac Telephone Co. of Virginia v. United States*, 42 F.3d 181, 185 (4th Cir. 1994), *cert. granted*, 115 S.Ct. 608 (1995), *vacated and remanded sub. nom. United States v. Chesapeake & Potomac Tel. Co.*, 134 L.Ed.2d 46 (1996)). *See also* Cablevision Systems/CCTA Comments at 33-34.

[44]*Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry* in CC Docket No. 87-266, 7 FCC Rcd 300, 312 (1991).

[45]*Memorandum Opinion and Order on Reconsideration* in CC Docket No. 87-266, 7 FCC Rcd 5069, 5072 (1992).

[46]*See National Cable Television Ass'n, Inc. v. FCC*, 33 F.3d 66, 72 (D.C. Cir. 1994).

[47]*See, e.g., Society of Plastics Indus., Inc. v. ICC*, 955 F.2d 722, 728-29 (D.C. Cir. 1992) (in interpreting the meaning of the term "joint rate" within the Interstate Commerce Act, the court set forth the doctrine of ratification which holds that "when Congress reenacts, without change, statutory terms that have been given a consistent judicial or administrative interpretation, Congress has expressed an intention to adopt that interpretation"); *Long v. Director, Office of Workers' Compensation Programs*, 767 F.2d 1578, 1581 (9th Cir. 1985) ("'when a legislature borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase'") (quoting *Fusco v. Perini North River Assocs.*, 601 F.2d 659, 664 (2d Cir. 1979), *vacated on other grounds*, 444 U.S. 1028 (1980)). We therefore disagree with those commenters that assert that the technical distinction between "cable service" and "video programming" in Section 602 of the Communications Act requires a different result. *See* Tandy Comments at 2-3; EIA, et al. Reply Comments at 4.

[48]National League of Cities, et al. Reply Comments at 33.

operate open video systems, but to distinguish the conditions under which entities may operate such systems. We do agree with the National League of Cities, et al. that Congress did not intend the terms to be precise synonyms. Rather, "providing video programming" may or may not be synonymous with "providing cable service," depending upon who owns the transmission facilities and the manner in which video programming is provided. With respect to cable systems, the cable operator is entitled both to own the facilities and to select programming for channels other than those being used for PEG access, must-carry broadcast stations, and leased access. We believe that Congress used the term "video programming" to ensure Commission oversight over whether persons that operate cable systems may also participate in open video systems, both by providing video programming over their own open video systems and by providing video programming over another entity's system.

16. We also disagree with the argument by the National League of Cities, et al. and Alliance for Community Media, et al. that the second sentence of Section 653(a)(1) is nothing more than a clarification that cable operators may provide video programming on a LEC's open video system that Congress inserted in response to the debate over whether a cable operator could be a programmer on a video dialtone system under the Commission's former rules.[49] There is no evidence to support this assertion on the face of the statute or its legislative history. Moreover, if Congress added the second sentence merely to resolve the dispute over cable operators' carriage rights on a video dialtone system, the more likely place would have been in Section 653(b), which describes video programming providers' carriage rights, not Section 653(a), which addresses the certification process for open video system operators.[50] Indeed, we believe the statute's delineation of "an operator of a cable system or any other person" in Section 653(a)(1), the certification provision, supports our view that Congress intended that these entities, like LECs in their service areas, could obtain certification to operate open video systems.

17. We also disagree with commenters that find it significant that only common carriers or telephone companies are referred to in new Section 651(a)(4) and in the titles to new Part V of Title VI of the Communications Act and Section 302 of the 1996 Act.[51] Similarly, we disagree with commenters that claim that references to common carriers or telephone companies in the legislative history indicate that Congress did not intend to allow non-LECs to become open

[49] *See* National League of Cities, et al. Comments at 48; Alliance for Community Media, et al. Comments at 37.

[50] *See* Cox Comments at 3-4; Comcast, et al. Comments at 4; Time Warner Reply Comments at 13.

[51] Several commenters note that Section 651(a)(4) permits a "common carrier" to elect to operate open video systems. State of New Jersey Bd. of Pub. Util. Comments at 3; EIA et al. Comments at 7 n.18; Info. Tech. Indus. Council Reply Comments at 2; Michigan Cities, et al. Reply Comments at 15. New York City remarks that Section 302 of the 1996 Act is entitled "Cable Service Provided by Telephone Companies." New York City Comments at 4. In addition, some commenters note that Part V to Title VI of the Communications Act, which was created by Section 302, is entitled "Video Programming Services Provided by Telephone Companies." State of New Jersey Bd. of Pub. Util. Comments at 3; New York City Comments at 4; Alliance for Community Media, et al. Comments at 36; State of New York Comments at 6; Michigan Cities, et al. Reply Comments at 15; Regional Cable Group Reply Comments at 4.

video system operators.[52] Part V was created against the backdrop of the statutory repeal of the telephone-cable cross-ownership restriction, which prohibited telephone companies from providing video programming to subscribers in their telephone service areas.[53] In this context, it is logical that the legislative history would have focused on the telephone companies' new options for entering the video marketplace. But, given the 1996 Act's overall intent to open all telecommunications markets to competition,[54] we do not read the legislative history's focus on telephone companies to mean that Congress intended to deny all others the opportunity to use this new model for delivering video programming. Indeed, we believe that with the express reference to cable operators and others in the second sentence of Section 653(a)(1), Congress intended to provide just such an opportunity.

18. We conclude, therefore, that Section 653(a)(1) does not preclude entities other than LECs in their service areas from becoming open video system operators. We believe that permitting non-LECs and LECs outside their service areas to become open video system operators is not only a "permissible" reading of the statute, but a reading that adheres most closely to Congressional intent to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition,"[55] and that is consistent with the public interest, convenience and necessity. We agree with UTC that Congress did not intend the 1996 Act, which is designed to eliminate outdated regulatory distinctions, to be used as the basis for creating new ones.[56] Similarly, we agree with CATA's general argument that all entities should "have the option to make the same choices, unconstrained by artificial regulations based on their historic regulatory classification."[57] As Comcast argues, any benefits gained through open video

[52]Commenters cite the Conference Report's statements that Section 651 "specifically addresses the regulatory treatment of video programming services provided by telephone companies" and that Section 653(a) "focuses on the establishment of open video systems by local exchange carriers." Conference Report at 171-72, 177. The Conference Report also provides that "[t]he Conferees recognize that telephone companies need to be able to choose from among multiple video entry options to encourage entry." Id. at 177. *See, e.g.*, State of New Jersey Bd. of Pub. Util. Comments at 3; EIA et al. Comments at 7; New York City Comments at 4; Tandy Comments at 3.

[53]*See* 1996 Act § 302(b)(1).

[54]Conference Report at 113.

[55]*Id.*

[56]UTC Comments at 2-3. *See also* Cox/Comcast Reply Comments at 6.

[57]CATA Comments at 2. *See also* US West Comments at 2 ("No cable service provider should be 'locked in' to one option while everyone else has choices."); Optel Reply Comments at 2 (other entities are entitled to the same delivery flexibility as LECs, which may now provide video programming by essentially any technologically available means).

systems would also generally result from open video systems owned by non-LECs.[58] By making the open video system option available to utility companies and others, this interpretation will foster facilities-based competition and maximize consumer choice by providing a wider range of outlets for unaffiliated video programming providers.[59]

19. We disagree with those commenters that argue that Congress intended to offer a less regulatory option solely to LECs in their service areas, as the new entrants in the video marketplace, in order to enable them to compete with cable systems.[60] In these commenters' views, there is no need to offer cable operators similar regulatory incentives because they are already entrenched in the video marketplace.[61] Several commenters assert that if cable operators could become open video system operators, it would only increase their competitive advantage, thus defeating Congress' attempt to level the playing field.[62] Since one of the purposes of the

[58]Comcast, et al. Comments at 3. *See also* Time Warner Comments at 27; NCTA Comments at 28 (the Commission should not limit which companies can operate open video systems since Congress determined open video systems to be a legitimate type of service that it believed would serve the needs of operators, programmers, and users).

[59]*See* UTC Comments at 3; Cablevision Systems/CCTA Comments at 31-32; Cox Comments at 3; Viacom Comments at 7; TCI Comments at 21-22; Time Warner Reply Comments at 14; MPAA Comments at 11; American Cable, et al. Comments at 24; Adelphia/Suburban Cable Reply Comments at 12; Independent Cable Assn. Reply Comments at 2.

[60]*See, e.g.*, State of New Jersey Bd. of Pub. Util. Comments at 5; Alliance for Community Media, et al. Comments at 36-37; Tandy Comments at 3-4. *See also* EIA, et al. Comments at 8; Minnesota Cities Comments at 14; City of Denver Reply Comments at 10-11; EIA, et al. Reply Comments at 4-6.

[61]*See* National League of Cities, et al. Comments at 48; Info. Tech. Indus. Council Reply Comments at 2; EIA, et al. Reply Comments at 5-6

[62]*See* State of New Jersey Bd. of Pub. Util. Comments at 5; Michigan Cities, et al. Reply Comments at 16; Tandy Comments at 4. *See also* EIA, et al. Comments at 8; Regional Cable Group Reply Comments at 4.

Many commenters contend that to ensure that open video systems remain a tool to create competitive entry into the video services market, the Commission must prohibit cable operators from becoming open video system operators. *See, e.g.*, Access Tucson Reply Comments at 1; PG County Community TV Reply Comments at 1; State of Hawaii Reply Comments at 2; Multnomah Community TV Reply Comments at 1; D.C. Public Access Corp. Reply Comments at 1; Cincinnati Community Video Reply Comments at 1; City of Pocatello Reply Comments at 1; Chicago Access Reply Comments at 1; Quote Unquote Reply Comments at 1; Access Sacramento Reply Comments at 1; Miami Valley Reply Comments at 1; Access Houston Reply Comments at 1; Plymouth Channel 3 Reply Comments at 1; Cambridge Community TV Reply Comments at 1; North Dakota Community TV Reply Comments at 1; BNN TV3 Reply Comments at 1.

Other commenters simply state without explanation that the 1996 Act does not permit cable operators to become open video system operators. *See, e.g.*, Orange County Reply Comments at 2; City of Boston Reply Comments at 1; City of Ann Arbor Reply Comments at 1; City of Charlotte Reply Comments at 1; City of Dayton Reply Comments at 1; City of Indianapolis Reply Comments at 1; Dade County Reply Comments at 2; Minnesota

1996 Act is to open all telecommunications markets to competition,[63] we do not believe that Congress intended to create a competitive video marketplace by giving one competitor a regulatory option that would be unavailable to all others. The argument that only LECs should be permitted to operate open video systems because they are new entrants in the video marketplace is contrary to the competitor-neutral thrust of the 1996 Act.[64] Indeed, it is because of the 1996 Act's expressed goal of promoting competition in all telecommunications markets, including the video market, that we believe Congress intended qualifying LECs and others to have the ability to offer open video services.[65] Moreover, if one of the objectives of the open video option is to encourage new entrants, it should be available to all new entrants -- including utility companies,[66] out-of-region cable operators,[67] out-of-region LECs and others -- and not restricted solely to LECs seeking to provide video programming in-region.

20. In any event, the Commission also could exercise its authority under Section 4(i) of the Communications Act to permit non-LECs to become open video system operators even assuming *arguendo* that it was clear and unambiguous that the second sentence of Section 653(a)(1) addressed only the issue of whether cable operators and others could provide programming on a LEC's open video system and did not address the issue of whether non-LECs could also become open video system operators. Section 4(i) permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[68] The Commission may properly take action under Section 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions. We invoke Section 4(i) here because the statute does not expressly prohibit non-LECs and out-of-region LECs from becoming open video system operators and because affording the widest range of entities the open video

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Cities Reply Comments at 3; City of Portland Reply Comments at 1-2; City of Richardson Reply Comments at 2; City of St. Paul Reply Comments at 2; City of Santa Ana Reply Comments at 2; City of Encinitas Reply Comments at 2; City of Lake Forest Reply Comments at 2; City of Laurel Reply Comments at 1; Pitt County Reply Comments at 2; City of Kalamazoo Reply Comments at 1; North Dakota Cable Commission Reply Comments at 1.

[63]Conference Report at 113.

[64]Although the Info. Tech. Indus. Council argued that Congress intended to limit the open video system option to LECs, it acknowledged that doing so would be an "anomalous approach" contrary to "the overall thrust of the Telecommunications Act of 1996 toward harmonized, deregulated environments in which modes of delivering comparable services were encouraged to compete on the same level playing field." Info. Tech. Indus. Council Reply Comments at 1-2 (citations omitted).

[65]Conference Report at 113.

[66]*See* UTC Comments at 2-4.

[67]*See* City of Seattle Comments at 2.

[68]Communications Act § 4(i), 47 U.S.C. § 154(i).

alternative is necessary to effectuate the competitive purposes of the 1996 Act.

21. Section 4(i) has been held to justify various Commission regulations that were not within explicit grants of authority.[69] In these cases, the courts found that the Commission's regulations were not inconsistent with the Act because they did not contravene an express prohibition or requirement of the Act, and were reasonably "necessary and proper" for the execution of the agency's enumerated powers. Most recently, in *Mobile Communications Corp. of America v. FCC*,[70] the D.C. Circuit acknowledged the Commission's authority under Section 4(i) to regulate even where the Communications Act does not explicitly authorize such action. In that case, the D.C. Circuit held that the Commission had authority under 4(i) to require Mtel, which held a pioneer's preference, to pay for a narrowband personal communications service ("PCS") license, despite the fact that the Act did not specifically authorize the Commission to charge a price for a license granted to a pioneer's preference holder.[71] The court denied Mtel's argument that the Commission's action was inconsistent with the Communications Act and

[69]*See, e.g., New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1107-09 (D.C. Cir. 1987) (affirming an FCC order requiring telephone companies to refund charges they had collected in excess of the authorized rate of return, even though the Act's only provision explicitly authorizing refunds "does not apply to the circumstances of this case," because refunds were necessary to remedy the violation of the Commission's rate of return order); *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292-93 (7th Cir. 1985) (affirming a Commission order pursuant to Section 4(i) requiring the Bell holding companies to file capitalization plans for subsidiary companies organized to sell telephone equipment, even though the Act conferred no authority on the Commission over holding companies (and the legislative history of the Act suggested that Congress had considered granting such authority but ultimately denied it) because such a requirement "was necessary and proper to the effectuation of" the Commission's functions; "Section 4(i) empowers the Commission to deal with the unforeseen -- even if that means straying a little way beyond the apparent boundaries of the Act -- to the extent necessary to regulate effectively those matters already within the boundaries."); *Lincoln Telephone Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981) (holding that Section 4(i) granted the Commission the authority to require a tariff filing by a telephone company that arguably qualified as a "connecting carrier," where the only provision in the Act expressly requiring carriers to file tariffs specifically exempted connecting carriers); *Nader v. FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975) (holding that an FCC order prescribing a rate of return for AT&T allowed the public to receive the benefit of the protection inherent in the Commission's authorization to prescribe just and reasonable charges, and therefore "was in the public interest, necessary for the Commission to carry out its functions in an expeditious manner, and within its section 4(i) authority" even though the Act makes no mention of any authority to prescribe a rate of return); see also *Southwestern Cable Co.*, 392 U.S. 157, 180 n.46 (1968) (recognizing Section 4(i) as basis for Commission's authority to act in furtherance of its statutory purpose).

[70]77 F.3d 1399 (D.C. Cir. 1996) (*rehearing petition pending*)

[71]The Commission granted Mtel a pioneer's preference in 1992. In 1993 Congress amended the Communications Act to allow the Commission to use auctions for allocation of some kinds of licenses (including PCS licenses) when "mutually exclusive applications are accepted for filing." *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Section 6002 (codified at 47 U.S.C. § 309(j)). The Commission subsequently reversed its decision that Mtel would not have to pay for its license, in part, because of the Commission's "clearer understanding of the interdependence of the nationwide narrowband PCS licenses and the potential anticompetitive effects that the free award of one of these licenses may have on the PCS market as well as the auction process." *In Re Application of Nationwide Wireless Network Corp.*, 9 FCC Rcd 3635, 3640 (1994).

therefore not within the Commission's Section 4(i) power.[72] The court found Mtel's reliance on the *expressio unius maxim* -- that the expression of one is the exclusion of other -- misplaced. According to the court, "[t]he maxim 'has little force in the administrative setting,' where we defer to an agency's interpretation of a statute unless Congress has "'directly spoken to the precise question at issue.'"[73] The court also denied Mtel's argument that in the absence of an affirmative statutory mandate to support the payment requirement, the Commission's action was not "necessary in the execution of [the Commission's] functions," as required by Section 4(i).[74]

22. Applying these principles here, the Commission is authorized under Section 4(i) to allow non-LECs and out-of-region LECs to become open video system operators. First, allowing non-LECs and out-of-region LECs to become open video system operators is not inconsistent with any provision of the statute. While the 1996 Act allows LECs to become open video system operators in their service areas, neither it nor the legislative history expressly prohibits non-LECs and out-of-region LECs from being open video system operators. Second, allowing non-LECs and out-of-region LECs to become open video system operators is necessary to the execution of the Commission's functions. Congress enacted Section 653 of the 1996 Act to promote competition in the video marketplace and to "meet the unique competitive and consumer needs of individual markets."[75] Permitting non-LECs and out-of-region LECs to become open video system operators will serve these statutory objectives. It will achieve increased competition, particularly between facilities-based service providers, which Congress specifically sought to achieve.[76] In addition to promoting competition between competing open video system providers, allowing non-LECs and out-of-region LECs to operate open video

[72]Mtel argued that the payment requirement was inconsistent with the Commission's authority to collect various fees and to conduct auctions specifically because those grants of power necessarily deny any authority to impose charges in other ways.

[73]*Mobile Communications Corp. of America v. FCC*, 77 F.3d at 1404-05 (citing *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (quoting *Chevron v. NRDC*, 467 U.S. 837 (1984)).

[74]The Commission had argued that in imposing the payment requirement it relied on its duty to determine "whether the public interest, convenience, and necessity will be served" by the granting of a license application as required by Section 309(a). The court found that "in light of that requirement, the payment condition would be 'necessary in the execution of [the Commission's] functions' under Section 4(i) so long as the Commission properly found it necessary to "ensure the achievement of the Commission's statutory responsibility' to grant a license only where the grant would serve the public interest, convenience, and necessity." *Mobile Communications Corp. of America v. FCC*, 77 F.3d at 1406 (citations omitted). The court found that the concerns alluded to by the Commission in its Licensing Decision, specifically "the unjust enrichment of Mtel from a free license while, under the new auction regime, others would be required to pay," or "the prospect of predation by Mtel," "would support a finding that the payment requirement is 'necessary in the execution of [the Commission's] functions.'" *Id.*

[75]Conference Report at 177.

[76]Conference Report at 174 ("the conferees agreed, in general, to take the most restrictive provisions [of the buyout prohibitions] of both the Senate bill and the House amendment in order to maximize competition between local exchange carriers and cable operators within local markets").

systems will benefit third party programmers by increasing the number of available outlets and by providing a non-discriminatory platform for distributing programming and services.[77] We believe that under Section 4(i) we have the necessary authority to allow non-LECs and out-of-region LECs to become open video system operators.

b. Public Interest Conditions on Non-LEC and Out-of-Region LEC Entry

23. We find that Section 653(a)(1) allows non-LECs and out-of-region LECs to operate open video systems, but only to the extent prescribed by the Commission consistent with the public interest, convenience, and necessity. In that regard, we find: (1) that it would serve the public interest, convenience and necessity to permit non-LECs and out-of-region LECs that are also not cable operators to own or operate open video systems; (2) that it would serve the public interest, convenience and necessity to permit cable operators to own or operate open video systems outside of their cable franchise areas;[78] and (3) that it would not serve the public interest, convenience and necessity to allow a cable operator to own or operate an open video system within its franchise area where there is not "effective competition" as defined below.[79]

24. The underlying premise of Section 653 is that open video system operators would be new entrants in established markets, competing directly with an incumbent cable operator.[80] We believe that Congress exempted open video system operators from most Title VI regulations because, in the vast majority of cases, they will be competing with incumbent cable operators for subscribers. Thus, we believe that it is not in the public interest to permit incumbent cable operators, in the absence of competition, to convert their cable systems to open video systems.[81] In certain circumstances, particularly where the entry of a facilities-based competitor into a market served by an incumbent cable operator would likely be infeasible, we believe that it would

[77]Opening up open video systems to non-LECs is also necessary to fulfill other provisions of the Communications Act similarly enacted to advance competition in the video market and the proliferation of programming outlets. These sections include: Section 601(4) (purposes of Title VI are to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public); Section 601(6) (purposes of Title VI are to "promote competition in cable communications and minimize unnecessary regulations that would impose an undue economic burden on cable systems); and Section 628 (program access provisions, the purpose of which is "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market"). *See* Communications Act §§ 601(4), 601(6), and 628, 47 U.S.C. §§ 521(4), 521(6), and 548.

[78]*See* City of Seattle Comments at 2.

[79]*See* State of New Jersey Bd. of Pub. Util. Comments at 8 (arguing that cable operators should not be able to become open video system operators in their cable franchise areas unless they are subject to "effective competition").

[80]*See* Conference Report at 178.

[81]*See* Minnesota Cities Comments at 15.

be consistent with the public interest to allow the incumbent cable operator to convert its cable system to an open video system. We will consider petitions from cable operators seeking such a public interest finding.

25. Because the concerns set forth above exist regardless of whether a cable operator also provides telephone service, we will not permit a cable operator to become an open video system operator in its cable franchise area if effective competition is not present for video programming delivery, even if it also becomes certified as a local exchange carrier within the franchise area.[82] The second sentence of Section 653(a)(1) authorizes the Commission to determine when cable operators may become open video system operators, and the Commission retains this authority with respect to all cable operators, regardless of whether they are also providing local exchange service. Therefore, although the first sentence of Section 653(a)(1) allows LECs, without qualification, to operate open video systems within their telephone service areas, this sentence does not apply to cable operators that are also LECs.

26. Accordingly, we find that the public interest, convenience and necessity would best be served by allowing a cable operator to operate an open video system in its cable franchise area only if it is subject to "effective competition" pursuant to Section 623(l)(1). Our decision to permit cable operators to become open video system operators in their franchise areas if they are subject to effective competition pursuant to Section 623(l)(1) does not affect the terms of any existing franchising agreements or other contractual agreements.[83] Conversion to an open video system would not relieve a cable operator of its existing contractual obligations to the local franchising authority, programming providers, or others

B. Certification Process

1. Notice

27. Section 653(a)(1) provides, among other things, that an open video system operator must certify to the Commission that it complies with the Commission's regulations under Section 653(b).[84] The Commission must publish notice of the receipt of a certification and approve or

[82] *But see* NCTA Comments at 27-28 (cable operators that are also new entrant LECs are unequivocally entitled under the Act to become open video system operators); NCTA Reply Comments at 25 (same); National League of Cities, et al. Reply Comments at 36 (at the most, a cable operator should be permitted to operate an open video system only in the telephone service areas where it is also a LEC).

[83] Several commenters expressed concern about the effect that conversion to an open video system would have on local franchising agreements. *See* National League of Cities, et al. Comments at 49-50; City of Dallas Comments at 7; City of Seattle Comments at 2; State of New Jersey Bd. of Pub. Util. Comments at 8; City of Mountain View Comments at 1; City of Denver Comments at 8; Minnesota Cities Comments at 15; City of Quincy Reply Comments at 1; Regional Cable Group Reply Comments at 4.

[84] Communications Act § 653(a)(1), 47 U.S.C. § 573(a)(1).

disapprove the certification within ten days of receipt.[85] The *Notice* sought comment on the timing of a certification filing, the appropriate level of review, the type of information that should be required, and the handling of any pleadings filed with respect to the certification within the ten-day review period.[86] The *Notice* also asked what actions or representations should be required in the certification process to ensure that LECs comply with Part 64 of the Commission's rules, which require a LEC to segregate its cost of providing regulated telecommunications services from its cost of providing video programming over an open video system.[87]

2. Discussion

28. In light of the brief period (ten days) allowed for Commission review of certification filings, we agree with those commenters that argue that Congress intended the certification process to be streamlined.[88] This conclusion is consistent with Congress' elimination of the requirement that a common carrier obtain Commission approval under Section 214 to construct a new facility prior to the establishment of a video delivery system, including an open video system.[89]

29. We also agree with those commenters that argue the Commission should avoid turning the certification process into a "back-door" Section 214 requirement.[90] We do not believe that the ten-day certification period was intended to be the culmination of a lengthy proceeding. Thus, we will not require pre-certification submissions or approvals that erect the same barriers to entry and potential for delay that Congress sought to eliminate.[91] We conclude that it is permissible, but not necessary, prior to certification for an open video system operator to

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[85] *Id.*

[86] *Notice* at paras. 68-69

[87] *Id.* at para. 70. As the *Notice* stated, the specific cost allocation requirements of Part 64 between telephone company operations and open video system operations is being addressed in a separate rulemaking. *Id.* at para. 70 n.82. *See Notice of Proposed Rulemaking* in CC Docket No. 96-112, FCC No. 96-214 (released May 10, 1996).

[88] *See* Telephone Joint Commenters Comments at 31; MFS Communications Comments at 15-17; USTA Comments at 20; NTCA Comments at 3-4; NYNEX Comments at 26; NYNEX Reply Comments at 18; MFS Communications Reply Comments at 6-7; Bartholdi Cable Reply Comments at 7. *But see* National League of Cities, et al. Reply Comments at 13-15 (ten-day review period does not mean Commission should adopt a pro forma certification process).

[89] *See* Communications Act § 651(c), 47 U.S.C. § 571(c); Conference Report at 172-73.

[90] *See* MFS Communications Comments at 17; MFS Communications Reply Comments at 6; Telephone Joint Commenters Reply Comments at 19; Bartholdi Cable Reply Comments at 6.

[91] *See* Telephone Joint Commenters Comments at 31-32; USTA Comments at 21; NYNEX Reply Comments at 18; USTA Reply Comments at 6, 9-10; Broadband Reply Comments at 10-11

(1) modify and obtain approval of its cost allocation manual pursuant to Part 64 of the Commission's rules;[92] (2) obtain the consent of local authorities for use of the public rights-of-way;[93] or (3) obtain the approval of local authorities regarding the manner in which Section 611 obligations will be fulfilled.[94]

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[92]For the reasons stated above, we disagree with commenters that argue that compliance with the Part 64 cost allocation procedures must be completed before the submission of a certification filing. *See, e.g.*, Pennsylvania PUC Comments at 8; NCTA Comments at 38; Continental Comments at 11; Cablevision Systems/CCTA Comments at 28; Time Warner Comments at 15-16; CATA Comments at 3; State of California Comments at 12-13; GSA Reply Comments at 5; Time Warner Reply Comments at 8-9.

As discussed below in this section, although an applicant that is required to file a cost allocation manual need not modify its manual prior to certification, the applicant must certify that it will modify its cost allocation manual in accordance with the Commission's rules, which require that changes to the cost apportionment table and to the description of time reporting procedures be filed with the Commission at least 60 days before the changes will be implemented. *See, e.g.*, Cox Comments at 5-9; TCI Comments at 3-7; NCTA Comments at 21-23; Continental Comments at 11; Cablevision Systems/CCTA Comments at 25-31; MCI Comments at 7-8; Time Warner Comments at 13-16; Comcast, et. al Comments at 7-9; CATA Comments at 3; GSA Comments at 4-5; State of California Comments at 12-13; Alliance for Public Technology Comments at 9-10; Alliance for Community Media, et. al Comments at 3-4; NARUC Comments at 6; CCTA Reply Comments at 6-8; GSA Reply Comments at 3-6; MCI Reply Comments at 7-8; NCTA Reply Comments at 20-22; Cox/Comcast Reply Comments at 10-11; Adelphia/Suburban Cable Reply Comments at 8-10; Time Warner Reply Comments at 6-9.

The substantive cost allocation requirements are being addressed in a separate rulemaking. *See Notice of Proposed Rulemaking* in CC Docket No. 96-112, FCC No. 96-214 (released May 10, 1996) ("Cost Allocation *NPRM*"). That proceeding will address cost allocation issues raised by several commenters urging the Commission to prevent LECs from subsidizing open video systems at the expense of their regulated telephone ratepayers.

Even though cost allocation procedures related to open video systems are not specifically addressed in the 1996 Act, incumbent local exchange carriers cannot offer services over such systems without complying with the Commission's cost allocation rules. Because the current rules may not be adequate to address these cost allocations for integrated systems providing both telephony and video services, the Commission linked the cost allocation *NPRM* to this proceeding to comply with the 1996 Act's directive "to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans ." Conference Report at 113; Cost Allocation *NPRM* at paras. 7-8.

[93]*See* National League of Cities, et al. Comments at 69-72 (certification filings must demonstrate that applicant has received all necessary authorizations from local authorities regarding public rights-of-way); Texas Cities Comments at 10-11 (certification should include authorizations to use public rights-of-way); Michigan Cities, et al. Reply Comments at 17-18 (local consents to use public rights-of-way must be obtained before certification); City of Denver Reply Comments at 11 (local governments must be a part of the certification process to ensure approval for use of public rights-of-way); Regional Cable Group Reply Comments at 5 (prior to certification, applicants must obtain all local permits and approvals to use public rights-of-way).

[94]*See* National League of Cities, et al. Comments at 71-72 (certification filings must demonstrate that applicant has received all necessary authorizations from local authorities regarding PEG requirements); NCTA Comments at 38-39 (pre-filed information should include a demonstration that operator will comply with PEG requirements); City of Denver Comments at 8-9 (the filing of documentation detailing compliance with PEG requirements should be a

30. In addition to the potential for delay, some of the pre-certification requirements suggested by commenters are beyond the scope of the certification process. Section 653(a)(1) requires an open video system operator to certify that it "complies with the Commission's regulations under subsection (b)."[95] Some of the suggested pre-certification requirements arise under other subsections of Section 653 and thus are not properly part of the certification process (e.g., PEG obligations arise under subsection (c)).[96] Others, such as the establishment of a separate subsidiary, are not provided for at all under Section 653.

31. A streamlined certification process does not mean, however, that the Commission may not request and review necessary information.[97] We intend the certification process to provide purposeful representations regarding the responsibilities of the open video system operator. We also will require other information, if necessary, to determine compliance with the Commission's rules. In this regard, we will first require that certifications be verified by an officer or director of the applicant, stating that, to the best of his or her information and belief, the representations made therein are accurate. Second, the certification must contain particular facts and representations about the system, including:

(1) the applicant's name, address and telephone number;

(2) a statement of ownership, including all affiliated entities;

(3) if the applicant is a cable operator applying for certification within its cable franchise area, a statement that the applicant is qualified to operate an open video system under Section 76.1501 of the Commission's rules.

(4) a statement that the applicant agrees to comply and to remain in compliance with each of the Commission's regulations under Section 653(b);[98]

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prerequisite to a certification filing); Texas Cities Comments at 10-11 (certification should include agreements from all local franchising authorities that PEG requirements will be met); City of Denver Reply Comments at 11-12 (local governments must be a part of the certification process to ensure that PEG requirements are satisfied).

[95]Communications Act § 653(a)(1), 47 U.S.C. § 573(a)(1).

[96]*See* Telephone Joint Commenters Reply Comments at 24-25 (Open video system operators need not certify that they will comply with Title VI requirements since those requirements are imposed in Section 653(c), not Section 653(b). Moreover, Section 653(c)(1) specifies that the requirements apply "to any operator of an open video system for which the Commission *has approved* a certification under this section.") (emphasis added).

[97]*See* NCTA Reply Comments at 32 (short review period does not justify an inadequate review).

[98]In certifying compliance with each of the requirements under Section 653(b), open video system operators agree to comply with the Commission's implementing regulations regarding non-discriminatory carriage; just and reasonable rates, terms and conditions; a one-third capacity limit on the amount of activated channel capacity on which an open video system operator may select programming when demand for carriage exceeds system capacity;

(5) a general description of the anticipated communities or areas to be served upon completion of the system;

(6) the anticipated amount and type (i.e., analog or digital) of capacity (for switched digital systems, the anticipated number of available channel input ports); and

(7) a statement that the applicant will comply with the Commission's notice and enrollment requirements for unaffiliated video programming providers.

32. The Commission's rules require incumbent local exchange carriers to allocate their costs between their regulated and nonregulated activities in accordance with specific cost principles.[99] The largest incumbent local exchange carriers are further required by the Commission's rules to file cost allocation manuals with the Commission.[100] These manuals include the specific accounting procedures the carriers use to allocate their costs between regulated and nonregulated activities. Such procedures must be consistent with the specific cost principles established by the Commission. The rules also provide that, for certain changes to the cost allocation manuals, such changes must be filed with the Commission "at least 60 days before the carrier plans to implement the changes."[101] Companies seeking certification as open video system operators that are required to file cost allocation manuals need not modify their manuals prior to certification. These companies, however, must certify that they will modify their cost allocation manuals in a timely manner as set forth in the Commission rules. We now address what constitutes "a timely manner."

33. As indicated above, the rules require carriers to file proposed changes to their cost allocation manuals 60 days before the changes will be implemented. The changes are implemented when the carrier uses the new procedures to allocate its booked costs between regulated and nonregulated activities. Generally, there are two types of events that result in costs that are placed on the company's books of account and allocated between regulated and nonregulated activities: constructing facilities and providing service. Pursuant to our rules, the great majority of construction costs associated with plant will be used jointly to provide telephony and video services (regulated and nonregulated activities) do not affect the carrier's revenue requirement until the service is offered. We are most concerned with cost allocation compliance once the carrier begins charging customers for the service. Therefore, for purposes of the initial changes to the cost allocation manuals of carriers that are seeking certification as an open video system, we will require a certification that the changes to the manuals will be filed 60 days before

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channel sharing; application of the rules concerning sports exclusivity, network non-duplication, and syndicated exclusivity; and non-discriminatory treatment in presenting information to subscribers.

[99] *See* 47 C.F.R. § 64.901

[100] *See* 47 C.F.R. § 64.903.

[101] *See* 47 C.F.R. § 64.903(b).

service is offered. We will also require that the manuals address procedures to allocate the construction costs pursuant to our rules.

34. Open video system operators may apply for certification at any point prior to the commencement of service, subject to two conditions. If construction of new physical plant is required, the applicant must obtain Commission approval of its certification prior to the commencement of construction. This requirement will ensure that the public rights-of-way are disrupted only by those who are authorized to operate open video systems. If no new construction is required, certification must be obtained prior to the commencement of service, allowing sufficient time to comply with the Commission's notification requirements to programming providers.[102] In order to facilitate the review process and to assure the completeness of submissions, applicants will be required to file for certification on FCC Form 1275, attached at Appendix C.[103] In addition to requiring that hard copies of the certification forms be filed with the Office of the Secretary, Federal Communications Commission, we will also require applicants to file certification forms on computer disk so that the Commission can post them immediately on its Internet site.[104]

35. We will consider comments or oppositions to a certification that are filed within five days of the Commission's receipt of the certification. Comments or oppositions must be served on the party that filed the certification. Disapproval of a certification will not preclude the applicant from filing a revised certification or from refiling its original submission with a statement addressing the issues in dispute. Such refilings must be served on any objecting party or parties. Any certification filing that the Commission does not disapprove within ten days will be deemed approved.[105]

36. If the representations contained in a certification filing prove to be materially false or materially inaccurate, the Commission retains the authority to revoke an open video system operator's certification or to impose such other penalties it deems appropriate, including forfeitures.

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[102]*See infra* Section III.C.1.c.

[103]This FCC Form 1275 is subject to approval by the Office of Management and Budget. A standardized form should address TCI's concerns that certifications be uniform, concise, and accurate since the Commission will have limited time to review them in detail. TCI Comments at 19-21 (recommending the enforcement of a strict "letter-perfect" standard).

[104]Filings should be on 3.5 inch diskettes formatted in an IBM compatible form using Windows 3.1 and Excel 4.0 software or such other diskette and format as announced by the Cable Services Bureau in a Public Notice. Any attachments or other material not easily stored on computer disk may be filed in hard copy only.

[105]*See* NYNEX Comments at 27